PREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1263

ROGER D. BRANIGIN, EDWIN M. S. STEERS, THURMAN M. DEMOSS, AS MEMBERS OF THE STATE ELECTION BOARD OF INDIANA, JOSEPH W. SUMMERS,

Appellants,

vs.

NELSON G. GRILLS, DOROTHY C. DUDDLESTON, JOHN P. GALLAGHER, MILES H. MARSHALL, LOUIS Y. MUNDY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA.

MOTION TO AFFIRM.

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Appellees move the Court to affirm the judgment sought to be reviewed on the appeal of Joseph W. Summers on the ground that it is manifest that the questions on which the decisions of the cause depends are so unsubstantial as not to need further argument.

Rule 16(1)(c) authorizes filing a Motion to Affirm the judgment sought to be reviewed on appeal from a Federal Court for the above stated cause.

I. NO SUBSTANTIAL QUESTION HAS BEEN PRESENTED BY APPELLANT JOSEPH W. SUMMERS.

Rule 15(1)(f) requires "a statement of the reasons why the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution." Appellant Summers alleges four questions (Appellant Summers' Jurisdictional Statement page 3). These four questions express in different language the following basic proposition: Where a state law establishing congressional districts has been ruled unconstitutional and a Federal District Court is requested to establish districts in lieu thereof, the Court has *no* power other than to maintain the existing, albeit unconstitutional, congressional districts making only such population adjustments between them as will result in a *de minimus* variance from the optimum. The necessary corollary to this proposition is that *no consideration whatsoever* can be given to the integrity of county lines or other governmental units, historical patterns or geographic boundaries. Appellant Summers includes language in his question number 4 questioning the District Court's right "to disrupt a congressional district created by the Legislature of a homogeneous group consisting of negroes and low income persons other than removing from such legislative created district the overpopulation of 9,210 persons to an adjoining underpopulated district." There is no allegation of racial gerrymandering such as that alleged in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). In Section V sub-paragraph 3 he discusses disturbing the heart of homogeneous district in the same fashion as he discusses any other district, *e.g.* that the Court should only make "as little adjustments as are necessary to bring the districts in line with Article I, Section 2." (Jurisdictional Statement, page 8.)

Therefore, Appellees conclude that Appellant Summers,

despite his language of homogeneous groupings intends to raise no issue here other than the same issues raised in his first three questions.

The essence of Appellant Summers' position is that county lines cannot be considered for any purpose whatsoever in drawing congressional districts. Appellant's proposition has no basis in law either as announced by this Court or by six Federal Districts which have, in fact, redistricted. This motion is not the place for detailed examination of all these Federal Court redistricting decrees. Brief examination of the Maryland case, which this Court has reviewed and approved, will suffice. *Maryland Citizens Committee etc.* v. *Tawes,* 253 F. Supp. 731 (D. Md. 1966) affirmed sub nom.; *Alton* v. *Tawes,* 384 U. S. 315.

Maryland has twenty-one counties. Of these twenty-one, boundary line integrity of only three was violated. Two very large counties, Montgomery (340,000) and St. Georges (357,000) were not split. The only three counties that were split were Baltimore, Anne Arundel and Howard Counties. Baltimore County had to be split because of its excessive population. Anne Arundel and Howard are both adjacent to Baltimore County and had to be added to residual portions of Baltimore County to complete districts. The First District consists of the Bay area counties which are sparsely populated. The three-judge panel in the Maryland case expressly removed Harford County from the old First District and added Calvert and St. Marys Counties (along with part of Anne Arundel County) to form the new First District. Under Appellants' novel theory the Maryland Court could not have made any changes in the old First District except to add sufficient population to bring that district from 14.9% below the optimum up to the optimum. This could have been done by pulling population out of Baltimore County, since Harford County (part of the old First District) is adjacent to Baltimore County and since

Baltimore County had to be divided in any event. The District Court's *rejection* of such an approach was necessarily approved by this Court in *Alton* v. *Tawes*. The three-judge panel in the Maryland case stated:

> "Some departure from the ideal is, of course, inevitable. The equality which the Constitution commands allows, however, only minor deviations which may occur in the recognition of rational and legitimate factors, free from the taint of arbitrariness, irrationality and discrimination." (Page 733)

On page 734 of that Opinion, the Court stated:

> "A basic goal has been to achieve the requirements of equality laid down in the Supreme Court decisions without doing unnecessary violence to the heart of existing districts, county lines, and district lines within the counties and ward lines in the city. We think that our plan makes the districts as compact as possible and in the few cases where it was deemed necessary to split a county, we have taken into account the character of the neighborhoods involved."

Appellants' unusual theory, that county lines can be given *no consideration whatsoever*, flies in the face of this Court's decision in *Reynolds* v. *Sims*, 84 S. Ct. 1362 (1964), page 1391:

> "A state may legitimately desire to maintain the integrity of various political subdivisions insofar as possible and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting without any regard for political subdivisions or natural or historical boundaries may be little more than an open invitation to partisan gerrymandering."

While it must be admitted that Congress has not, as yet, devised a formula to ensure compact and contiguous districts, the desirability of obtaining such a formula is un-

questioned. A quick look at the dissenting judge's map of grotesquely formed districts side by side with the majority's map of compact and regularly formed districts provides eloquent testimony in support of the language of this Court quoted from *Reynolds* v. *Sims* and the stamp of approval placed by this Court on *Maryland Citizens Committee* v. *Tawes.*

Reynolds v. *Sims,* 84 S. Ct. 1362 and *Wesberry* v. *Sanders,* 84 S. Ct. 526 do *not* support the proposition that it is improper to give *any* consideration to county lines in drafting congressional districts.

Appellant Summers (Appellant's Jurisdictional Statement, page 6) points out four instances in the history of the State of Indiana when county lines have been broken. Two of these instances were found in the Acts of 1965, Chapter 205, subsequently held to be unconstitutional. Three of the four instances involved Marion County which by virtue of its concentration of population must be split. In no instance in the entire history of the State of Indiana has any county been divided into more than one congressional district other than the counties of Lake and Marion. It is conceded that the population of these two counties requires division and the Federal Court plan so provides. Appellant Summers cannot say that Indiana has no consistent policy against dividing counties into different congressional districts.

The number of counties switched or the population transferred is of no relevance. In the State of Illinois, 14 counties were transferred outside of Cook County. *People* v. *Kerner,* 33 Ill. 2d 460, 211 N. E. 2d 736 (1965) U. S. District Court participated. In the case of Tennessee, 23 out of 96 counties were moved to obtain a four percent (4%) variation. *Baker* v. *Ellington,* 273 F. Supp. 174 (M. D. Tenn., 1967). In Tennessee, only one county (Shelby County, the home of Memphis, Tennessee) was split.

WHEREFORE, Appellees submit that the decision of the three-judge Federal Court from which the Appeal by Appellant Summers has been taken should be affirmed in all things without plenary consideration.

Respectfully submitted,

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